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EX PARTE OR LATE FILED

August 15, 2001

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

By Courier

Ms. Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
445 12th Street S.W., TW-A325  
Washington, D.C. 20554

Re: **Ex Parte Submission of Pegasus Broadband Corporation**  
**ET Docket No. 98-206, RM-9147, RM-9245, DA 99-494, DA 00-1841,**  
**and DA 00-2134**

Dear Ms Salas:

Pegasus Broadband Corporation ("Pegasus") hereby files this written *ex parte* letter to rebut allegations made by Northpoint Technology, Ltd. ("Northpoint") regarding Pegasus' qualifications to hold a Multichannel Video Distribution and Data Service ("MVDDS") license in the 12 GHz band. In recent months, Northpoint has urged the grant of its license and attacked Pegasus' qualifications to hold an MVDDS license.<sup>1</sup> Northpoint alleges that Pegasus failed to participate adequately in the MITRE Corporation ("MITRE") study and that Pegasus violated the Commission's *ex parte* rules.

Northpoint's allegations have no merit. As discussed below, Pegasus provided its MVDDS technology for comprehensive analysis, satisfying statutory requirements. Pegasus also did not violate the Commission's *ex parte* rules, which did not apply to the MITRE proceeding.

<sup>1</sup> See, e.g., Letter from J.C. Rozendaal to Magalie Roman Salas (April 19, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (May 24, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (June 27, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (July 26, 2001); see also, Comments of Northpoint Technology, Ltd. on MITRE Corporation Report (May 15, 2001); Reply Comments of Northpoint on the MITRE Report (May 23, 2001).

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ENCLOSURE

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**I. PEGASUS SATISFIED THE REQUIREMENTS OF THE LOCAL TV ACT TO SUBMIT TECHNOLOGY FOR DEMONSTRATION OR ANALYSIS**

Northpoint alleges that Pegasus failed to satisfy the requirements of the Local Television Act of 2000 ("the Local TV Act")<sup>2</sup> for participation in the technical study conducted by MITRE. Specifically, Northpoint asserts that Pegasus failed to provide any equipment to MITRE for testing, and that Pegasus provided only partial answers to questions posed by MITRE, thereby failing to comply with the "demonstration" component of the statute.

Contrary to Northpoint's interpretation, the Local TV Act does not require the provision of specific hardware or field tests, but instead requires only that an independent entity "analyze" an applicant's "technology."<sup>3</sup> The record is clear that MITRE analyzed Pegasus' technology.<sup>4</sup> Pegasus timely submitted information about its technology to MITRE in request to all of MITRE's questions.<sup>5</sup> In these responses, Pegasus addressed design parameters such as waveform characteristics, MVDDS antenna patterns (including data supplied by the antenna manufacturer), identified operating parameters for its technology, such as the typical height and tilt of the antennas Pegasus proposes to deploy, and provided other information relevant to sharing with DBS, such as MVDDS tower height, the possibility of better-shielded DBS antennas, and the shielding provided by buildings.

The information about its technology that Pegasus submitted to MITRE enabled MITRE to fully carry out the mandated analysis.<sup>6</sup> MITRE simulated Pegasus' MVDDS

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<sup>2</sup> Pub. L. No. 106-553, App. B. Tit. X, 114 Stat. 2762 (December 21, 2000).

<sup>3</sup> *Id.* To the extent that actual equipment was provided, MITRE used such equipment only for more precise measurements characterizing the antenna patterns. In any event, as the MITRE Report recognizes, for purposes of interference analysis the transmitting equipment proposed by Pegasus has identical characteristics to the transmitter and antenna provided by Northpoint. *See* MITRE Report, at 5-10, B-57. In fact, the equipment is made by the same manufacturers (L-3 Communications, formerly LNR, and Seavey Engineering Associates).

<sup>4</sup> The common definition of "technology" is not restricted to hardware. For instance, The Random House Dictionary defines technology broadly as "a technological process, invention, method, or the like." Random House Dictionary 1950 (1<sup>st</sup> ed. 1983).

<sup>5</sup> *See* Letter from Bruce D. Jacobs to Magalie R. Salas (April 10, 2001).

<sup>6</sup> Pegasus also participated in a subsequent meeting with MITRE on February 21, 2001, at which time Pegasus inquired with MITRE as to whether its technical responses to MITRE's questions had been adequate, and discussed with MITRE mitigation techniques identified by Pegasus in its responses.

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operations, assessed its potential interference to DBS, and generated computer-simulated interference contours for Pegasus' proposed technology -- the same simulated analysis conducted for Northpoint's proposed technology.<sup>7</sup> MITRE never expressed any concern about its ability to analyze Pegasus' technology. To the contrary, MITRE specifically commented on the effectiveness of certain of Pegasus' proposals.<sup>8</sup>

## II. PEGASUS HAS NOT VIOLATED THE *EX PARTE* RULES

Northpoint alleges that Pegasus' response to the MITRE questions, submitted initially on a confidential basis, and Pegasus' later communications with the FCC regarding the licensing of its technology for MITRE's use, violated applicable *ex parte* procedures. Northpoint's accusations are unfounded and incorrect.

The *ex parte* rules require that communications be submitted on the record in certain specific FCC proceedings.<sup>9</sup> The MITRE study was not such a proceeding and neither was the negotiation concerning the licensing of Pegasus technology. Moreover, the Local TV Act contemplates that the opportunity for public comment would come after the independent entity conducting the analysis had concluded its report and submitted it for the record. That is exactly what happened here, giving Northpoint ample opportunity to comment on Pegasus' submissions to MITRE and MITRE's analysis of those submissions.

The Commission never imposed any *ex parte* requirements regarding the MITRE proceeding. This includes at the initial January 24, 2001 meeting of the various interested parties. In fact, the day after that meeting, EchoStar Satellite Corporation filed a letter describing a telephone conversation with FCC staff in which EchoStar recommended that all MITRE participants file *ex parte* notices of written and oral contacts with MITRE staff.<sup>10</sup> At the time, the Commission did not respond to this proposal.

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<sup>7</sup> "The measured radiation patterns of four different kinds of *MVDDS transmitting antennas* were used in the simulations: the large and small sectoral horns of Northpoint and Pegasus, respectively," and "the final three simulations employed Pegasus antenna patterns." MITRE Report, at 5-4 (emphasis in original).

<sup>8</sup> See e.g., MITRE Report, at 6-4, B-58 (Pegasus' proposal to use larger MVDDS receiving antennas would effectively reduce MVDDS output power and interference contours).

<sup>9</sup> See 47 C.F.R. §§ 1.1200 *et seq.*

<sup>10</sup> See Letter from Pantelis Michalopoulos to Magalie Roman Salas (January 25, 2001).

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Two months later, the Office of Engineering and Technology informally asked participants to file and serve copies of their communications with MITRE on all other study participants for the purpose of facilitating the exchange of information.<sup>11</sup> Pegasus voluntarily complied with the FCC's request to exchange information. On April 10, 2001, Pegasus submitted copies of its technical responses to MITRE's questionnaires to all of the other MITRE participants. Similarly, after the FCC requested that Pegasus send copies of its licensing request to the other MITRE participants, Pegasus voluntarily complied with that request.<sup>12</sup> At the same time, Pegasus sought clarification from the FCC about the request and expressed its view that the MITRE study was outside the scope of the *ex parte* requirements. The FCC never addressed Pegasus' question.

Pegasus has acted reasonably and lawfully during this proceeding. Due to its initial concerns about the protection of its intellectual property prior to the submission of patent applications, Pegasus submitted information to MITRE questionnaire on a confidential basis. However, once Pegasus filed its patent application, it removed its confidential designation on information submitted to MITRE,<sup>13</sup> provided the requested information, and submitted subsequent responses to MITRE without any requirement for confidentiality.

The same principles apply to the negotiation of a licensing agreement between Pegasus and the Commission. Northpoint cites no authority for its argument that those negotiations were governed by provisions of the *ex parte* rules that required their disclosure, and the General Counsel's office, which participated in the discussions, never invoked those rules. Indeed, Northpoint's conduct in negotiating its own license agreement belies its contention that the negotiations had to be an open process. Northpoint's license agreement with the FCC, which was executed on February 6, 2001, was not made a part of the record until April 25, 2001.<sup>14</sup>

Northpoint also has failed to demonstrate that it was prejudiced either by its alleged lack of access to information about Pegasus' technology, or by Pegasus' negotiations with the FCC regarding a license. In fact, Northpoint was fully aware of

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<sup>11</sup> See Letter from Office of Engineering and Technology to MITRE Parties (March 23, 2001).

<sup>12</sup> See Exhibit 1 to Reply Comments of Pegasus to the MITRE Report (May 23, 2001) (providing e-mail correspondence between Pegasus and the Commission regarding the licensing of Pegasus' technology).

<sup>13</sup> See Letter from Bruce D. Jacobs to Magalie Roman Salas (April 10, 2001).

<sup>14</sup> See License Agreement, Northpoint Technology, Ltd. and Federal Communications Commission (filed April 25, 2001).

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Pegasus' licensing agreement negotiations, and actively discouraged the FCC from signing such an agreement with Pegasus.<sup>15</sup>

An original and 12 copies of this letter are submitted for inclusion in the public record in the above-captioned proceedings. Please direct any inquiries regarding this submission to any of the undersigned.

Respectfully submitted,



Bruce D. Jacobs

Tony Lin

Amy L. Van de Kerckhove

Counsel for Pegasus Broadband Corporation

Document #: 1142788 v.5

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<sup>15</sup> See, e.g., Letter from J.C. Rozendaal to Magalie Roman Salas (April 19, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (April 20, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (April 23, 2001) (opposing Pegasus' license request).

**CERTIFICATE OF SERVICE**

I, Renee Williams, hereby certify that on this 15<sup>th</sup> day of August, 2001, copies of the foregoing were served by hand delivery\* and/or First Class United States mail, postage prepaid, on the following:

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